

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matters of)	
)	
Petition for Declaratory Ruling That VarTec Telecom,)	
Inc. is not Required to Pay Access Charges to)	
Southwestern Bell Telephone Company or Other)	
Terminating Local Exchange Carriers When Enhanced)	
Service Providers or Other Carriers Deliver the Calls)	
to Southwestern Bell Telephone Company or Other)	
Local Exchange Carriers for Termination)	WC Docket No. 05-276
)	
and)	
)	
Petition for Declaratory Ruling That UniPoint Enhanced)	
Services, Inc. d/b/a PointOne and Other Wholesale)	
Transmission Providers are Liable for Access Charges)	

COMMENTS OF JOINT CLEC COMMENTERS

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Summary

The Petitions for Declaratory Ruling filed by SBC Communications and VarTec Telecom, Inc., are vaguely worded and inartfully articulated. As a result, there is a concern that the Petitions could be read to be seeking reversal of the Commission's decision in its *AT&T Declaratory Ruling* that LECs cannot collect access charges from intermediate local exchange carriers ("LECs") that hand off traffic to terminating LECs over interconnection trunks provisioned pursuant to the terms of interconnection agreements ("ICAs"). Nothing in either Petition affirmatively seeks that result or provides argument in support of such a reversal. SBC's Petition requests the Commission make "wholesale transmission providers" liable for access charges. But SBC neither carefully defines what constitutes a "wholesale transmission provider" nor articulates whether these "wholesale transmission providers" are liable for access charges instead of, or in addition to, interexchange carriers. VarTec's Petition seeks to have access charges recovered from the carrier making the direct arrangements with the incumbent local exchange carrier ("ILEC") or LEC for termination of the interexchange traffic and thus suggests that access charges could apply to intermediate LECs.

NuVox Communications, XO Communications and Xspedius Communications, Inc. ("Joint CLEC Commenters") file these comments to urge the Commission to reaffirm its prior ruling that access charges *do not* apply to *any* LECs and to clarify that switched access tariff charges do not apply to CLEC traffic carried over interconnection trunks. The Commission's Rules and its *AT&T Declaratory Ruling* clearly establish that access charges apply only to IXCs and neither SBC nor VarTec should be permitted to circumvent this rule by using vaguely defined terms to identify the party responsible for the access charges or by disclaiming to be the customer of the terminating LEC.

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COMMENTS OF JOINT CLEC COMMENTERS

NuVox Communications, XO Communications and Xspedius Communications, Inc. ("Joint CLEC Commenters"), by their attorneys and in accordance with the FCC's Public Notice in the above-referenced docket,¹ hereby file comments on the Petitions for Declaratory Ruling filed by SBC Communications ("SBC"), on behalf of its incumbent local exchange carrier ("ILEC") affiliates, and VarTec Telecom, Inc. ("VarTec") in the above captioned matter.²

SBC's Petition seeks a ruling that "when wholesale transmission providers use IP to carry ordinary long distance calls that originate and terminate on the public switched telephone network ('PSTN'), they are acting as 'interexchange carriers' for purposes of Rule 69.5 and are

¹ Public Notice, *Pleading Cycle Established for SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, DA 05-2514, WC Docket No. 05-276 (Sep. 26, 2005).

² Petition of the SBC ILECs for a Declaratory Ruling, filed by Southwestern Bell Telephone, L.P., *et al.*, WC Docket No. 05-276 (Sept. 19, 2005) ("*SBC Petition*"); Petition for Declaratory Ruling, filed by VarTec, WC Docket No. 05-276 (August 20, 2004) ("*VarTec Petition*").

accordingly subject to access charges.” *SBC Petition* at 2. VarTec seeks a series of related rulings. The principal ruling that VarTec seeks would be to the effect that, where an IXC does not directly make contractual or business arrangements with the local exchange carrier (“LEC”) serving the called party, that IXC is not subject to access charges from that LEC. *VarTec Petition* at 3. Implicit in the ruling VarTec requests is that an enhanced service provider or another carrier involved in transporting the traffic between that IXC and the terminating LEC serving the called party may be subject to access charges.³

INTRODUCTION

Both of these Petitions arise out of the Commission’s 2004 *AT&T Declaratory Ruling*⁴ with respect to the appropriate switched access charge treatment of so-called IP in the middle traffic. That ruling had two central components. First, the Commission held that an interexchange telephone call that used ordinary customer premises equipment with no enhanced functionality, that originates and terminates on the public switched telephone network, undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider’s use of IP technology, could be subject to the imposition of switched access charges. Second, the Commission declared that, in such cases, a LEC could, under certain circumstances, assess access charges against an interexchange carrier initiating the long distance component of

³ In addition to the relief described above, the VarTec Petition also seeks rulings (1) that attempts by a LEC to assess access charges against an IXC that does not directly make contractual or business arrangements with the LEC violates Sections 201(b) and 203(c) of the Communications Act, (2) regarding calls that originate on CMRS provider networks and do not cross MTA boundaries, LECs may not assess access charges against any carrier or provider involved in transporting that traffic, and (3) VarTec may charge a terminating LEC for its costs in transporting intra-MTA, CMRS-originated traffic that terminates on that LEC’s network. The CLEC Joint Commenters offer no comment on these requested rulings at this time.

⁴ *Petition for Declaratory Ruling that AT&T’s IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶¶ 14-15, 17 (2004) (“*AT&T Declaratory Ruling*”).

the call but could not seek to recover access charges “against any intermediate LECs that may hand off the traffic to the terminating LECs unless the terms of any relevant contracts or tariffs provide otherwise.”⁵ While neither Petition formally seeks to reverse the second half of the *AT&T Declaratory Ruling*, each is written so vaguely as to raise this as a matter of concern.

SBC seeks to make “wholesale transmission providers” liable for access charges. SBC’s Petition is vague to the point of incoherence in defining the relief it seeks and the parties it seeks relief from. First, although it points to carriers such as UniPoint as examples of “wholesale transmission provider,” SBC does not define that term. Presumably, it does not include “intermediate LECs,” which the Commission has already declared are not subject to such access charges, because SBC has not asked the Commission to reconsider that ruling or offered any reasoned analysis as to why it should do so.⁶ However, SBC’s argument is so vague that it is impossible to be certain. Nor does SBC clearly articulate whether it wishes the Commission to declare that “wholesale transmission providers” should be held liable for interstate switched access charges *instead of* IXC’s or *in addition to* IXC’s under some theory of joint and several liability. If the latter, SBC never explains why it should be entitled to recover access charges from both, who it may (or must) seek collection from, how it will avoid double recovery and whether it may discriminate in favor of or against selected carriers or carrier types (such as, for example, affiliated IXC’s) in deciding who it will or will not bill for such charges.

VarTec seeks to have the carrier nearest the point of termination held liable for paying terminating switched access charges instead of the IXC receiving the call from an

⁵ *Id.*

⁶ Neither SBC nor VarTec has petitioned for reconsideration of the Commissions’ AT&T Declaratory Ruling. Hence, challenges to the exclusion of intermediate LECs from the imposition of switched access charges is presumably not part of either Petition.

originating CLEC and initiating the long distance transmission chain. VarTec also does not seek to have the Commission reconsider its ruling regarding intermediate CLECs and thus, also, does not explain why such carriers should have their interconnection trunk activities regulated under switched access tariffs and not under interconnection agreements.

The CLEC Joint Commenters' purpose for participating in this docket is limited. As discussed herein, the Joint CLEC Commenters urge the Commission, when resolving the two Petitions, to reaffirm their ruling in the *AT&T Declaratory Ruling* that access charges do *not*, under the Act or Commission's Rules, apply to *any* local exchange carriers – unless, depending on the specific facts, the LEC is not operating as a LEC but as an IXC. Further, the Commission should take the opportunity presented by the Petitions to make clear that any switched access tariff that purports to assess interstate access charges against another LEC is in violation of the FCC's Rules and therefore unlawful.

I. IN RULING ON THE SBC AND VARTEC PETITIONS, THE COMMISSION SHOULD CONFIRM THAT INTERSTATE ACCESS CHARGES MAY NOT BE ASSESSED AGAINST LOCAL EXCHANGE CARRIERS

A. The SBC Petition

Since the FCC issued its 2004 *AT&T Declaratory Ruling*, SBC has stepped up its efforts to assess and collect access charges on IP-enabled services of all types. But in doing so, SBC has not limited its collection efforts either to the category of services specifically addressed in the *AT&T Declaratory Ruling* or to the class of carriers that the Commission explicitly ruled might be liable for paying such charges. Thus, for example, SBC's complaint in the federal court for the Eastern District of Missouri was brought against several types of carriers and service providers, including IXCs, intermediate providers of enhanced services and/or Internet

protocol (“IP”) transport carriers, and CLECs.⁷ The foundation of SBC’s claim against each of the defendants was that it was entitled to recover access charges for the traffic in question, which SBC alleged was “IP in the middle” traffic subject to the *AT&T Declaratory Ruling*.⁸ However, fully aware that the Commission’s Declaratory Ruling precluded it from seeking to collect access charges from CLECs, SBC asserted claims against the various defendants under substantially different theories of law. SBC sought to recover access charges from IXC’s such as VarTec and providers such as UniPoint. However, SBC based its claims damages against CLECs on other legal theories instead of seeking recovery of access charges from them.⁹ SBC, thus, recognized, in bringing its Missouri complaint that it had no access charge recovery claim against local exchange carriers that, like SBC, were involved in the local termination of the traffic in question. In this respect, SBC was acting consistently with the determination of the Commission in the *AT&T Declaratory Ruling* (on which it relied before the court) that, under FCC Rules, access charges may apply only to interexchange carriers or end user customers:

We note that, pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. 47 C.F.R. § 69.5(b). To the extent terminating LECs seek application of access charges, *these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off*

⁷ *Southwestern Bell Tel., v. VarTec Tel. et al.*, No. 4:04-CV-1303 (E.D. Mo.).

⁸ Significantly, in the Eastern District of Missouri Case, no findings of fact have been made. Indeed, the case is still in the pleadings stage (*see fn. [7]*, *infra*), and discovery has not commenced.

⁹ A Motion to Dismiss SBC’s complaint as to several CLEC defendants is pending before the district court on the basis, *inter alia*, that SBC’s tort and other claims are really attempts to collect access charges from parties not subject to them, in violation of the AT&T Declaratory Ruling and the filed rate doctrine. On November 2, 2005, SBC filed a Notice of Voluntary Dismissal of XO Communications and its affiliates from this case.

*the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.*¹⁰

The court also recognized the distinction between carriers that might be subject to access charges and carriers that are not. In dismissing SBC's claim against UniPoint, which was later modified to a stay pending Commission action on the SBC Petition, the District Court for the Eastern District of Missouri emphasized that it would have to determine whether UniPoint was an interexchange carrier in order to grant SBC the relief it sought.¹¹ The district court's decision underscores the reach of the Commission's access charge Rules, and decisions such as the *AT&T Declaratory Ruling*, reinforcing the conclusion that access charges may not be assessed against CLECs.

SBC asserts in its Petition here that "any suggestion that wholesale transmission providers are exempt from access charges is entirely without merit."¹² The problem with this

¹⁰ *AT&T Declaratory Ruling*, 19 FCC Rcd at 7471, n.92 (emphasis added).

¹¹ *Southwestern Bell Tel. L.P. v. VarTec Telecom., Inc.*, Memorandum and Order, No. 4:04-CV-1303 (E.D. Mo. Aug 23, 2005) *amended in part* Memorandum and Order, No. 4:04-CV-1303 (E.D. Mo. Sep. 29, 2005)

¹² *SBC Petition* at 3. SBC claims that UniPoint and other alleged and so-called "IP in the middle" providers have been openly defying the *AT&T Declaratory Ruling*. *Id.* at 1. The CLEC Joint Commenters take no formal position in these Comments on the merits of SBC's (and VarTec's) claims against carriers similar to UniPoint. However, we note that the Commission, in the *AT&T Declaratory Ruling*, not only distinguished between IXCs and CLECs, but also appeared to distinguish between IXCs and providers of IP transport when it comes to the issue of access charges: "[W]hen a provider of IP-enabled voice services contracts with an interexchange carrier to deliver calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, *the interexchange carrier* is obligated to pay terminating access charges." *AT&T Declaratory Ruling*, 19 FCC Rcd 7470. No doubt, the Commission now has the opportunity to articulate more fully and clearly what its policies are under current rules and regulations regarding the applicability of interstate access charges to providers of IP transport. Any changes to current regulations on this subject, however, should not, and cannot, occur in this declaratory ruling docket, but instead should occur in the Commission's *Intercarrier Compensation* or *IP-enabled Services* Rulemakings.

assertion, however, is SBC's vague use of the term "transport service provider." If SBC intends to include CLECs within that term, then the assertion quoted above is simply false; ignoring the Commissions' express holding in the *AT&T Declaratory Ruling Order* that "intermediate CLECs" are not subject to such charges.¹³ Using the term "transport service provider" instead of "intermediate CLEC" does not change the import of the ruling with respect to CLECs.

Begrudgingly, but never directly, SBC seems to acknowledge that access charges cannot be assessed against other LECs that are involved in terminating an interexchange call. Nonetheless, consistent with its dragging XO, NuVox and Xspedius before the federal district court in Missouri, SBC takes the occasion to engage in a minor campaign to besmirch the role of CLECs in addition to the central targets of the Petition. For example, the Petition includes a series of diagrams designed to show how companies such as UniPoint are allegedly evading access charges and CLECs are conspiring with them, by "improperly terminat[ing] the calls to the ILEC over local interconnection trunks"¹⁴ That argument is legally deficient. Even assuming, *arguendo*, that interexchange traffic is sent by a provider of IP-enabled services to a CLEC for termination and that the CLEC, in turn, delivers that traffic to an ILEC over local interconnection trunks, whether such an act is "improper" must be resolved under the terms and

¹³ SBC makes the argument at several points in its Petition that private carriers, in addition to common carriers, may be subject to access charges. *E.g.*, *SBC Petition* at 4 and 29-32. The problem with SBC's argument that private carriers can be subject to access charges is that, by definition, private carriers do not offer "telecommunications services." The Commission's Rules, however, allow access charges to be assessed only against those "interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications service." 47 C.F.R. § 69.5(b). In other words, private carriers, except where they might be deemed end user customers, fall outside the scope of Section 69.5, and thus the categories of persons or entities to whom interstate access charges might be applied.

¹⁴ *SBC Petition* at 8-9.

conditions governing the use of those trunks. The terms and conditions defining the interconnection rights and obligations between the CLEC and the ILEC are not set forth in access tariffs. Rather, they are typically set forth in a State-commission-approved interconnection agreement. Because the traffic at issue here is carried over interconnection trunks established between ILEC and CLEC pursuant to the terms of such Agreements, alterations to switched access tariffs or to rules governing such tariffs do not alter or amend the rights and obligations of the parties to transport and receive traffic over such trunks. This is, of course, why the Commission distinguished between IXC's and CLEC's in the *AT&T Declaratory Ruling* in the first place. *The propriety of any specific CLEC's actions, or those of CLEC's in general in carrying traffic over local interconnection trunks is not before the Commission in this docket.*

The Commission has already recognized this distinction as, for example, when it put out for public comment a Petition for Declaratory Ruling filed by Grande Communications addressing whether a LEC can rely on a representation from a customer that it is delivering enhanced service traffic for termination in determining what service to provide that customer (*i.e.*, local exchange or other local services or access services) and how to treat that traffic vis-à-vis interconnected carriers (*i.e.*, as local or interexchange traffic).¹⁵

Accordingly, in resolving the SBC Petition, the Commission should limit itself to the question raised by SBC, namely whether wholesale transmission providers that are *not* CLEC's that use IP to carry otherwise basic interexchange traffic that originates and terminates

¹⁵ See Public Notice, *Pleading Cycle Established for Grande Communications' Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls*, DA 05-2680, WC Docket No. 05-283 (October 12, 2005).

on the PSTN are acting as “interexchange carriers” for purposes of Rule 69.5 and are accordingly subject to access charges.

SBC’s diagrams also mischaracterize the role that CLECs play in terminating traffic that obscures, in part, why access charges should *not* be extended to CLECs. In *Illustrations 1* and *3* of the SBC Petition, SBC purports to depict “conventional” interexchange telephone calls, both with and without a wholesale provider supporting delivery of the traffic to the terminating local exchange.¹⁶ In these illustrations, only ILECs are depicted operating in the originating and terminating exchanges. By contrast, CLECs are depicted in *Illustrations 2* and *4*, but only in an effort, apparently, by SBC to suggest that CLECs are acting in complicity with “IP in the middle” providers to help the latter evade access charges.¹⁷ What SBC has failed to acknowledge is that, in *Illustrations 1* and *3*, CLECs may and often are jointly providing exchange access with ILECs. On the terminating end, for example, a CLEC switch might, in SBC’s diagrams, replace the ILEC Tandem, the ILEC End Office, both, or stand between the long distance carrier and the ILEC tandem or End Office. The same is true in *Illustrations 2* and *4*. In other words, contrary to the not-so-subtle suggestions conveyed through these diagrams, which of course SBC provides for comparative purposes, CLECs play roles comparable, even indistinguishable, from ILECs in terminating the traffic at issue.¹⁸

¹⁶ *SBC Petition* at 9 and 10.

¹⁷ *Id.* SBC notes that an IP provider might seek to purchase local interstate services from an ILEC in an effort to terminate the call directly to an ILEC and avoid access charges. *SBC Petition* at 10, n.9. SBC fails to distinguish between this scenario and where such a provider approaches a CLEC instead.

¹⁸ Indeed, where entities are evading access charges, it is inevitable that both CLECs and ILECs are being denied their fair share of access charges where access to the local network is provided on a meet-point billing or jointly-provided access basis, as it often is.

Despite these efforts to paint CLECs in a bad light, the SBC Petition ultimately cannot escape the fact that access charges, while they may apply to IXC's, *cannot, under the Act and the Commission's Rules, apply to CLECs that exchange traffic with ILECs over interconnection trunks.*¹⁹ Section 69.5(b) states clearly that access charges apply to IXC's that "use local exchange switching facilities for the provision of interstate or foreign telecommunications services."²⁰ "Local exchange switching facilities," and related transmission facilities, such as loops, transport and interconnection trunking, are exactly what CLECs, like ILECs, provide. More specifically, SBC expressly notes that interexchange carriers "use local exchange switching facilities" on an interstate or foreign telecommunication call when they "rout[e] the call through a CLEC to the incumbent LEC for termination to the called party."²¹

¹⁹ In the *AT&T Declaratory Ruling*, the Commission stated that "[d]epending upon the nature of the traffic, carriers such as commercial mobile radio service (CMRS) providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of [section 69.5(b) of the Commission's Rules.]" *AT&T Declaratory Ruling*, 19 FCC Rcd at 7470, n. 80. Whether a CMRS provider or a LEC acts as an IXC does not depend upon the nature of the traffic, *per se*, because the question of access charges only applies when an interexchange call has been made. The Commission could not have meant that CMRS carriers and LECs become IXC's when they are not the originating or terminating LEC with the direct relationship with the end user in question. If so, then there would have been no reason for the Commission to make the qualification. Instead, at most the Commission could have meant that, depending upon *the nature of the role* the CMRS provider or LEC plays in the transport of an interexchange call, the CMRS provider or CLEC may be subject to access charges. The CLEC Joint Commenters submit that the Commission should take the opportunity, when ruling upon the Petitions, to confirm that access charges may be assessed against carriers only when LECs, in carrying a portion of an *otherwise* interexchange call, perform interexchange functions beyond origination or termination of the call, *i.e.*, transmission and local and/or tandem switching. Whether access charges apply to a LEC in such a scenario would have to be made in the specific circumstances taking into account the nature of the functions performed (in other words, is the CLEC operating as an IXC), as well as any contracts between the two LECs, and the tariff of the LEC seeking to assess the access charges.

²⁰ 47 C.F.R. § 69.5(b).

²¹ *SBC Petition* at 20.

Even in describing the traffic at issue in the *AT&T Declaratory Ruling* and the subject of its Petition, SBC notes that the traffic in question, when routed through a CLEC rather than directly to SBC, is “terminated via CLECs.”²² As the SBC Petition explains, “access service” is defined as “services and facilities provided for the origination or termination of any interstate or foreign telecommunication.”²³ Thus, because CLECs, like the ILECs, are involved in the origination and termination of the traffic in question, access charges do not and cannot apply to them under the Rules.

Ultimately, we cannot tell whether, by using the term “transport service provider” SBC meant to acknowledge that CLECs are not subject to such access charges – hence the use of a different term -- or whether SBC intended to try to tacitly embed CLECs in its generic term without coming to grips with the Commission’s earlier ruling or the underlying applicable law. If the former, than the Joint CLECs take no position on the remainder of the SBC filing. If the latter, than SBC has simply failed to explain why the Commission should reverse itself and find that CLECs should be subject to access charges.

B. The VarTec Petition

VarTec argues that where access charges are due for traffic it carries, even where it has the retail relationship with the billed end user, some entity other than VarTec should be subject to access charges unless VarTec has a direct contractual or business relationship with the LEC terminating the traffic to the end user.²⁴ By contending that access charges should be borne by those that make direct arrangements with the ILECs or other terminating LECs for the

²² *Id.* at 21; *see also id.* at 10, n.9 (“IP in the middle providers” may attempt to terminate directly to ILECs by purchasing services from intrastate tariffs).

²³ *Id.* at 19 *citing* 47 C.F.R. § 69.2(b).

²⁴ *VarTec Petition* at 3-6.

termination of the interexchange traffic, VarTec suggests that access charges could apply to intermediate CLECs. But the same logic and the same law discussed above continue to apply: intermediate CLECs interact with terminating CLECs pursuant to interconnection agreements governed by the negotiations of the parties and any necessary arbitrations pursuant to sections 251 and 252 of the Telecommunications Act. Their respective rights and obligations are embodied in the specific provisions of those ICAs, and those agreements are not subject to amendment by changes in tariffs.

The VarTec petition, for the most part, ignores any analysis of the Commission's rules relating to access charges. VarTec's goal is *not* so much to have the Commission determine *who* should pay access charges as it is to ensure the Commission concludes that *VarTec is not liable* for access charges when it hires a UniPoint, a Transcom, or another carrier to make arrangements for the delivery of the traffic to the terminating LEC. It is implicit in the relief VarTec seeks that the terminating LEC is entitled to assess access charges against someone. VarTec bases its self-exemption on the assumption that VarTec has no contractual or business relationship with the terminating LEC, and is therefore not the terminating LEC's customer.²⁵ As a result of its analysis, VarTec's Petition leaves open the prospect that the penultimate LEC in the call flow, which of course has to make arrangements directly with the terminating LEC to allow call completion, might be the entity subject to access charges. However, for the reasons set forth above, under the Act and Commission Rules, LECs are not liable for access charges unless they are, in the particular circumstances, acting as an interexchange carrier. In particular, they are not subject to access charges where the arrangement for call completion is pursuant to traffic carried over local interconnection trunks whose use is

²⁵ *VarTec Petition* at 5-6.

governed by the terms of interconnection agreements. Accordingly, however the Commission rules on the VarTec Petition and the question of VarTec's liability, a subject on which the CLEC Joint Commenters do not comment, it should reaffirm the inapplicability of access charges to CLECs and other LECs.

II. IN REACHING ITS RULINGS, THE COMMISSION SHOULD CONFIRM THAT THE INAPPLICABILITY OF ACCESS CHARGES TO CLECS MAY NOT BE CIRCUMVENTED BY TARIFF, BUT ONLY THROUGH CONTRACT

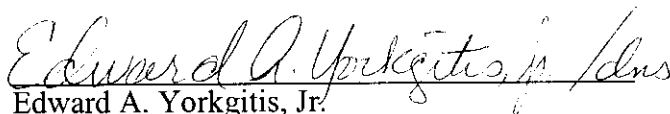
As a final matter, CLEC Joint Commenters are concerned that the Commission's discussion in the *AT&T Declaratory Ruling* inadvertently suggested that access charges could be assessed by one LEC against another by operation of tariff, and not just contract. Absent a rule change pursuant to notice and comment rulemaking, an interstate access tariff containing such provisions would be unlawful because it would run counter to the FCC's Rules. *See* 47 C.F.R. 69.5 (allowing access charges to be assessed against IXCs and end user customers). The CLEC Joint Commenters recognize that in certain factual scenarios, a carrier otherwise acting as a LEC may provide an interexchange service and so operate as an IXC. But in such cases, which should all be decided upon the specific facts, the terminating LEC would be assessing access charges against an IXC, not a LEC. In addressing the Petition, the Commission should take the opportunity to confirm that except in circumstances where carriers that operate as LECs provide interexchange services in support of the carriage of an interexchange call to the LEC that delivers the call to the calling party, *i.e.*, where the LEC is in fact operating as an interexchange carrier, LECs may not assess access charges against other LECs.

III. CONCLUSION

For the foregoing reasons set forth above, in ruling on the SBC and VarTec Petitions, the Commission should confirm that, under the Act and current Commission Rules.

LECs are not subject to access charges on interstate and foreign telecommunications unless they choose to bind themselves contractually.

Respectfully submitted,

A handwritten signature in cursive script, reading "Edward A. Yorkgitis, Jr.", followed by a horizontal line and the initials "dms".

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